The Hard Questions Must Be Asked: Who does FS §768.21(8) really serve?

The current malpractice system in Florida is dysfunctional because all major stakeholders—families, doctors/hospitals, insurance companies, and the state—are working at cross purposes. While each group claims to seek fairness and accountability, systemic contradictions prevent meaningful reform. In short, each stakeholder is only thinking about their own issue. There are many hurdles to repealing FS §768.21(8). But what if we considered each hurdle a step toward a common goal?

- **Surviving family members** say they want equal access to the courts and the right to recover noneconomic damages like any other citizen. However, they also say that it is not about money; it is about accountability. These advocates, and I am one of them, must clarify whether they seek justice beyond financial compensation and advocate for comprehensive accountability measures.
- **Medical professionals** want their malpractice insurance premiums to be lowered. Who can blame them? However, they must be willing to take greater responsibility for policing their own industry to reduce malpractice claims and protect ethical practitioners from rising premiums. They also must be willing to demand that all doctors carry malpractice insurance and share in the pool.
- **Insurance companies** want to turn a profit. To do so is not unAmerican. At the same time, they should recognize the economic benefits of refusing to insure repeat-offender doctors rather than continuing costly litigation. They need to stop expecting subsection 8 families to carry the burden of their mismanagement.
- **The state** must fulfill its primary duty to protect the rights of the people. This means not using them as pawns in a 35-year-old battle to protect corporate interests. The rights of the people should never be used as bargaining chips in a game to ensure access to healthcare, regulate the medical profession, safeguard public safety. The State must also remove financial conflicts of interest in lawmaking where one side has fat checkbooks and endless access to the legislature, and the other is given one to three minutes to make their case each year.

If all these needs are met and stakeholders find no better alternative, we approach a Nash Equilibrium—where no party can improve their position

without disadvantaging another. However, some problematic hurdles will remain if we only consider what is best for us and do not consider all sides.

Repealing Florida Statute §768.21(8) is not simply about financial recovery for grieving families—it is about restoring fairness, accountability, transparency, and trust in the healthcare and legal systems. Any reform will be incomplete and ultimately ineffective without addressing these underlying issues.

The right to access the courts is not merely about financial compensation—it is about ensuring transparency and accountability by bringing cases into the public eye. The deterrent effect of monetary damages is essential, as disciplinary actions by the Florida Department of Health (DOH) often amount to nothing more than a slap on the wrist. If left solely to the DOH, the penalties imposed on negligent practitioners would lack the weight necessary to prevent future harm. Equal access to the courts ensures that all citizens, regardless of their relationship to the deceased, have the same legal recourse for medical negligence.

Analysis of Florida Statute §768.21(8)

Florida is one of the very few states—if not the only one—that denies certain citizens the right to seek noneconomic damages in medical malpractice cases. Unlike other states where all individuals have equal access to legal remedies for wrongful death, Florida Statute §768.21(8) creates a carve-out that effectively eliminates the rights of some surviving family members. This statutory exclusion contradicts the fundamental principles of equal justice and due process.

I. Surviving Family Members and Their Advocacy for Repeal

Surviving family members seeking the repeal of Florida Statute §768.21(8) often express their motivations in terms of justice and accountability. However, their arguments raise several contradictions and gaps that require further examination.

1. Financial Compensation vs. Justice

- Many advocates claim that their efforts are not about money but about justice. However, the primary legal remedy available through the repeal of subsection 8 is either injunctive relief or financial compensation.

- If financial compensation is secondary, what alternative forms of accountability are they seeking?
- Are they advocating for criminal liability for negligent healthcare providers? If so, what changes to the law would be required to facilitate this?

2. Accountability Beyond Financial Compensation

- Advocates for repeal argue that they seek accountability. Yet, they have not prioritized reforms within the Florida Department of Health (FDOH), the agency responsible for vetting, regulating, and disciplining medical professionals.
- If accountability is the primary goal, should there be greater emphasis on strengthening disciplinary actions, improving transparency, and enhancing oversight mechanisms within the FDOH?
- The FDOH has been historically ineffective in taking meaningful action against negligent doctors. Would legislative efforts be better spent reforming the agency's oversight capabilities?

3. Defining Pain and Suffering: Who is the Real Victim?

- If the repeal argument is based on compensating pain and suffering, whose pain and suffering is being addressed?
    - If the claim is for the victim's pain and suffering, this raises an issue: How does a jury determine a just award for pain and suffering when one victim may have died on the operating table under anesthesia, and another victim languished for days or weeks in a state of sepsis?
    - If the claim is for the surviving family members' pain and suffering, how should a jury determine how much money makes a family "whole" again? One family may have been close-knit, spending a lot of time together, while another family may have been estranged and rarely spoke with the deceased. How is this measured? What proof must be provided to a jury?
    - Should there be a standardized calculation, or should it remain within the jury's discretion?

- Is there ever an amount of money that will erase someone’s pain and suffering? Or, are high damage awards more about punishing the negligent healthcare provider?

4. Punitive vs. Compensatory Damages

- Many advocates argue that they want negligent medical providers to be held accountable, but when pressed, what they truly want is for the doctor or nurse to be punished for his or her negligent act. Even lawyers will tell us that money is how you punish the tortfeasor. Yet, punitive damage is rarely, if ever, mentioned in their advocacy efforts.
- If a jury were to award $10 million in punitive damages, would that be sufficient justice? How about $5 million? Or $1 million? At some point, there has to be an agreement as to how much money will deter a negligent healthcare provider from acting carelessly again in the future.
- **To whom should punitive damages be paid?**
  - Should these damages be awarded to the deceased's family members, or should they be allocated to a public fund intended to improve patient safety? Or should they be split between the victim’s family and the State? Perhaps a three-way split between the victim’s family, State programs to help ensure patient safety, and a fund to help lower the cost of malpractice premiums?
  - Could such a fund be used to strengthen hospital oversight, fund patient advocacy, or provide legal aid for malpractice victims? Perhaps this money could be used to pay for the services of a medical expert or a private autopsy for those who cannot afford these services on their own.

II. Medical Professionals and Institutional Complicity

Medical professionals, particularly doctors, nurses, and hospital administrators, play a critical role in the malpractice system. However, their behavior often contradicts their stated objectives.

1. Lower Malpractice Premiums vs. Self-Regulation

- Medical professionals want their malpractice insurance premiums to decrease, yet they do little to regulate their own profession. Instead, they rely on the State to bar certain citizens from their right to a civil trial.

- If hospitals and physicians were proactive in reporting negligence, fewer lawsuits would be filed, and insurance claims would immediately decrease.
- The reluctance to report negligent peers suggests a culture of silence and protectionism, which ultimately increases litigation costs and malpractice premiums, not to mention causing the public to distrust the healthcare system.

2. Failure to Report Negligence

- Many doctors and hospitals fail to report their negligent colleagues, despite knowing that a small percentage of doctors are responsible for most malpractice claims.
- If responsible doctors reported negligent doctors, they would no longer bear the financial burden of increased malpractice premiums caused by the repeated negligence of the few.
- Hospitals that shield negligent doctors from accountability also contribute to the problem, ensuring that substandard care continues. This is the most crucial part of the crisis; patient safety is at risk when negligence is covered up. A reasonable person would think that a hospital would want negligence exposed, just as a business owner would want a lousy employee brought to his attention. These bad actors cost the hospital money. So why do they fight so hard and spend so much money to cover up the negligence?

3. The 2%-4% Problem: Repeat Offenders Drive Up Malpractice Costs

- Studies indicate that between 2% and 4% of doctors are responsible for 50% of malpractice payouts.
- Removing these few bad actors from practice could cut malpractice lawsuits in half while improving patient safety.

III. Insurance Companies and Their Role in Perpetuating the Problem

Insurance companies are in the game of making money. There is nothing wrong with that. After all, America runs on capitalism. However, when these companies lose money through bad investments or increased claims payouts, they have found a way to make up for that loss, at least in part. Insurance companies lobby the legislature to pass laws to protect negligent healthcare workers. FS §768.21(8) is a perfect example of this practice.

- Insurance companies spend millions of dollars per year litigating malpractice claims, often defending a handful of repeat offenders instead of working to eliminate them.
- If insurance companies proactively identified and eliminated negligent doctors, they could save at least half of what they currently pay in claims. Those savings would go a long way in reducing malpractice premiums for conscientious doctors.

IV. The Role of the State: Legislative and Judicial Duties

The government has a Constitutional and statutory duty to ensure public safety and fairness in the healthcare and judicial systems. However, systemic failures in both areas have led to the 35-year-old debate regarding FS §768.21(8).

Rights Are Not Bargaining Chips:
Access to the courts is a fundamental right enshrined in both the Florida Declaration of Rights and the U.S. Bill of Rights. These rights stem from the Social Contract and were never surrendered to the government upon its creation. No government entity has the authority to trade away the people's right to seek justice in the name of political expediency or economic considerations.

1. The State's Duty to Protect the Rights of Citizens

- The Florida Legislature and Judiciary are responsible for protecting the rights of all Floridians, including both patients and medical professionals.
- By maintaining a statute that denies certain families the right to seek an otherwise legal recourse, the State is violating its duty to ensure equal access to justice, as well as denying the people their right to participate in government as jury members.
- Florida juries are already entrusted with determining noneconomic damages in wrongful death cases that do not involve medical negligence. For example, in cases of wrongful death resulting from auto accidents or defective products, juries assess and award damages based on the severity of the loss and its impact on surviving family members. There is no principled reason why the same discretion should not apply to medical malpractice cases. The courts have long recognized the jury's role in determining fair compensation, and there

is no justification for depriving a specific class of victims of this fundamental right.

2. The State’s Duty to Ensure Safe and Adequate Healthcare

- The government is responsible for ensuring adequate access to healthcare, but this does not mean it should protect negligent practitioners at the expense of patient safety. What does it benefit the citizen to have an abundance of doctors and nurses if they have not been adequately vetted, regulated, or disciplined by the DOH? To say it another way, it would be the equivalent of skydiving, where the instructor points you to a shelf with 100 parachutes, but warns you that 2 to 4 of those 100 are defective and won’t open. Would you still make the jump, hoping you get one of the good ones?"
- A truly balanced approach would focus on increasing both accountability and ensuring access to high-quality care.

3. The Influence of Lobbyists: Conflicts of Interest in Lawmaking

- Florida legislators are currently permitted to accept campaign contributions from the medical and insurance industries, subject to established contribution limits and disclosure requirements. However, ethical considerations arise if such contributions are intended to influence official actions addressed under Florida's conflict of interest statutes.
- Lawmakers are required to disclose how much money they receive from medical and insurance lobbyists, but should this be examined more closely? When the rights of the people have been denied as they are in Subsection 8, should certain campaign donations be denied as well?
- To ensure integrity in the legislative process, is it possible to require lawmakers who have received campaign contributions from the medical or insurance industries to recuse themselves from voting on matters related to medical malpractice laws, similar to other states or federal agencies that have financial conflict-of-interest rules for specific legislative matters?
- Such a reform would align with existing conflict-of-interest principles, such as a judge or a law firm recusing due to a conflict of interest, or when the lawmaker has a vested interest such as stock in a company. This might go a long way to reestablishing public trust in the legislative

process. The people of Florida deserve laws that are crafted in the interest of justice, not dictated by those with a financial stake in the outcome.

Conclusion

The Florida Legislature will not act unless it feels pressure, and that pressure must come from logic, ethics, public interest, and exposing the financial motivations behind this law. The time for justice is now.

If the legislature truly represents the people of Florida, it must act in their interest—not in the interest of corporate lobbies that profit from injustice. Florida Statute §768.21(8) undermines fundamental rights and must be repealed.

The question remains: Who does FS §768.21(8) really serve?

Respectfully submitted,

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